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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ARTHUR ANDERSEN & CO.
Petitioner

v.

DAVID STEWART and
CHANNING SECURITIES, INC.
Respondents

ARTHUR ANDERSEN & CO.
Petitioner

v.

JULES SANDERS and MADALYNN SANDERS
Respondents

AND THREE OTHER ACTIONS

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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MISCELLANEOUS

Fed. R. Civ. P. 23	Passim

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

This brief is submitted by Arthur Andersen & Co. ("Andersen") in reply to respondent's brief in opposition to Andersen's Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit. This reply will address particular matters raised by respondents' in their brief in opposition.

REPLY TO RESPONDENTS' STATEMENT AS TO JURISDICTION

Respondents state that the Court of Appeals concluded it was unnecessary to decide the question of appellate jurisdiction. Although stating this was its conclusion, the Court of Appeals nonetheless went on to hold that Andersen was estopped from asserting that class members identified after the initial notice in 1974 must be provided with individual notice of their rights to intervene in the class action or to opt out from the class. This holding by the Court of Appeals, the same as the decision of the District Court, is itself a final decision on an issue collateral to the merits on a substantial question of federal law and subject to immediate interlocutory review pursuant to the collateral order doctrine. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Gillespie* v. *United States*, 379 U.S. 148, 153 (1964); *Cf. Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 347, n. 8 (1978) (order allocating the cost of class notice subject to immediate interlocutory review).

REPLY TO RESPONDENTS' STATEMENT OF REASONS FOR DENYING THE WRIT

(a) Standing:

Respondents assert that neither of the questions presented for review "challenges the correctness of the ruling that Andersen lacked standing to attack the 1979 orders."

Brief in Opposition, p. 9. This assertion is incorrect. The Court of Appeals concluded that Andersen had no standing to challenge the 1979 orders on two separate grounds. It held first that insofar as the 1979 orders approved a notice of partial settlement that Andersen had no standing because Andersen was not a party to the settlement. The second basis for its decision, and the issue before this Court, is the Court of Appeals' conclusion that Andersen's standing to raise issues regarding the notice requirements of Fed. R. Civ. P. 23(c)(2) extended only to the proceedings approving the initial notice to the class in 1974. *See Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit* (hereinafter "*App.*"), pp. 6-7. Both of the "Questions Presented for Review" are addressed specifically to the Court of Appeals' latter conclusion that Andersen could not assert in 1979 that class members identified subsequent to the notice in 1974 must also be provided with individual notice of their right to intervene or to opt out as mandated by Fed R. Civ. P. 23(c)(2).

(b) Estoppel:

Respondents assert that this case provides no basis for elaboration of any general rule of estoppel because the Court of Appeals relied on the specific facts of the present record to conclude an estoppel existed. The ruling of the Court of Appeals was to the contrary, and this case presents the issue of whether a litigant may be estopped from asserting that class members identified after an initial notice in a class action for damages must nonetheless be provided with individual notice of their rights as class members.

The record of the proceedings below amply depicts the generality of the issues before this Court. Andersen asserted before the Court of Appeals that the record of the proceedings in 1979 demonstrated that beneficial purchaser

class members to whom individual notice had not been directed in 1974, were identifiable inasmuch as 4,600 beneficial purchasers had been identified and provided with individual notice of the partial settlement in 1979. Andersen argued that under Fed. R. Civ. P. 23(c)(2) and this Court's decision in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 176 (1974), these class members who were identified in 1979 must be provided with individual notice of their right to intervene in the action or to exclude themselves from the class. The *Brief for Appellant,* pp. 32-34, provided specifically in part as follows:

"[ARGUMENT]

III. The Beneficial Purchasers Have Not Been Provided with Individual Notice of Their Right and Afforded an Opportunity to Exclude Themselves from the Respective Classes as Required by Rule 23 and the Due Process Clause of Amendment V to the Constitution of the United States.

The district court has never directed that any of the beneficial purchasers of Viatron securities be provided with notice of their right, and afforded an opportunity, to exclude themselves from the respective class actions. The joint notice of pendency of class actions in 1974, which provided members of the respective classes with the only notice of and opportunity to exclude themselves, was directed solely to the record holders of Viatron securities, including those nominees holding securities registered in 'street names' on behalf of the beneficial purchasers.

* * *

The record of the proceedings in 1979 with respect to the notice of the proposed settlement with the underwriters demonstrates that some of the beneficial purchasers could have been provided with individual notice of their right, and afforded an opportunity, to exclude

> themselves from the respective classes in conformance with Rule 23(c)(2)(A), (B), (C), Fed. R. Civ. P.
>
> * * *
>
> Rule 23(c)(2, Fed. R. Civ. P., requires that individual notice of their right to be excluded be provided to these identified class members and to all other members of the respective classes who can be identified through reasonable efforts."

The Court of Appeals rejected this argument. It concluded that even though a substantial number of class members were identified for the first time in 1979, this fact was not a circumstance which warranted consideration of whether these class members must be provided with individual notice of their right to intervene or to opt out as required by Fed. R. Civ. P. 23(c)(2). This conclusion is made apparent by its refusal to review the adequacy of the initial 1974 class notice in light of the subsequent identification of additional class members (*see App.*, pp. 5-6, where the Court of Appeals states that Andersen's interest in maximizing the *res judicata* effect of any judgment in its favor provides it with standing only to challenge the adequacy of the initial notice in 1974), and by the Court of Appeals' specific statement that Andersen is now estopped to raise issues regarding the adequacy of notice under Fed. R. Civ. P. 23(c)(2) because:

> "[Andersen] is not in the position of being able to proffer *any* excuse for its long delay in recognizing what it now claims to be a major defect in the 1974 notice, . . ." (*App.*, p. 7, emphasis added)

The two "Questions Presented for Review" and the "Reasons for Granting the Writ" set forth in the petition demonstrate that under prior decisions of this Court and of other Circuits, estoppel principles are wholly inapplicable and do not preclude reconsideration of an issue in light of a material change in the circumstances upon which resolution of the issue depends. *See Petition for Writ of Certiorari,*

pp. 12-14. The Court of Appeals holding in this case squarely presents the question of whether under Fed. R. Civ. P. 23(c)(2) and due process the fact of class members being specifically identified for the first time is a material circumstance which requires consideration of whether such class members must be provided with individual notice of their rights under Fed. R. Civ. P. 23(c)(2)(A)(B)(C). *See Petition for Writ of Certiorari,* pp. 7-10. Resolution of this issue does not depend on any circumstances peculiar to this case but, rather, on circumstances which are common to all class actions for damages.

The effect of the Court of Appeals' holding as to estoppel would appear to preclude Andersen from raising on appeal, after the trial in progress in the event of an adverse judgment, the inadequacy of the 1974 notice, in the light of the 1979 data, order and notice, despite the fact that no judgment has been entered on the 1974 order approving the 1974 notice and that the time for appeal with respect to the 1974 order and notice will not commence to run until final judgment is entered on the trial in progress. *See United States* v. *Indrelunas,* 411 U.S. 216, 219-221 (1973); *Bankers Trust Co.* v. *Mallis,* 435 U.S. 381, 384-385 (1978), *reh. denied* 436 U.S. 915 (1978). *See also Petition for Writ of Certiorari,* p. 12, n. 3.

(c) Issues Concerning the Form and Method of Notice to Class Members:

Respondents assert that there is no practical way to distinguish class members who may have received the 1974 notice, by publication or otherwise, from those class members who did not, and that this administrative consideration should excuse not providing individual notice pursuant to Fed. R. Civ. P. 23(c)(2) to the class members identified for the first time in 1979. Fed. R. Civ. P. 23(c)(2), however, requires that the District Court "shall direct" notice to the class, ". . . including individual notice to all members who

can be identified through reasonable efforts." *See Oppenheimer Fund, Inc.* v. *Sanders,* 437 U.S. 340, 354, n. 21 (1978); *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. at 176. It is undisputed that in 1974 the District Court directed individual notice only to those persons holding record title to securities of Viatron Computer Systems Corporation. *App.* pp. 13, 15-16.[1] It is likewise undisputed that 4,600 persons who allegedly purchased Viatron securities but who did not hold record title to the securities were identified for the first time in 1979 and that the District Court has never directed that individual notice be provided to any of these class members of their right to intervene or to opt out as required by Rule 23(c)(2)(A)(B)(C). The clear language of Fed. R. Civ. P. 23(c)(2) resolves any doubts as to whom such individual notice was required to be provided in 1979.

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[1] Respondents' assertion in their *Brief in Opposition,* p. 13, that "at least 12,880 of the 13,960 persons to whom the 1974 notice was mailed were in fact beneficial owners" is a mischaracterization apparently calculated to mislead this Court. The persons to whom notice was directed in 1974 were strictly record holders of Viatron securities, and not beneficial purchasers. Some of these record holders may in fact have been the owners of the securities recorded in their names, but the 1974 notice was directed solely to these persons and not to any of the class members whose securities were recorded in street names by brokerage houses, banks and other entities as nominees of beneficial purchasers.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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